[HIGH COURT OF AUSTRALIA.]

WHITFELD . . . . . APPELLANT;
DEFENDANT,

AND

DE LAURET AND COMPANY LIMITED . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1920.

SYDNEY, Nov. 17, 18, 19, 25.

Knox C.J., Isaacs and Rich JJ.

Action of Tort—Wheat pool scheme—Interference by Government with performance of contracts—Refusal of permit to ship wheat—Reasonable cause or excuse—Evidence—Consent by Attorney-General of Commonwealth to instituting proceedings—Damages—Damages at large—Exemplary damages—War Precautions (Supplementary) Regulations, regs. 10, 10A (*Statutory Rules* 1916, *No.* 129; 1917, *No.* 196).

Towards the end of the year 1915 the Government of New South Wales brought into operation a scheme involving the formation of what was known as a "wheat pool," for marketing the wheat harvest for the season 1915-1916. Under this scheme the flour-millers of the State became agents for the Government to receive and store wheat, and one of the terms of the agreements between the Government and the flour-millers was that the latter were not to buy, sell, store or otherwise deal with wheat except wheat covered by the agreements. The scheme came into operation on 1st December 1915. The plaintiff company brought an action against the Government, in which it alleged that the company owned certain wheat which it had purchased, and had entered into contracts for the sale of that wheat to certain purchasers; that, as agent for owners of wheat, it had made contracts for the sale of the wheat to certain other purchasers; and that the Government maliciously and without lawful cause or excuse, and with intent to injure the plaintiff in its business, induced, procured and forced the purchasers from it to break their contracts and refuse to accept delivery of the wheat, and induced, procured and forced the Commissioners for Railways and Tramways to refuse to carry the wheat, in contravention of the *Government Railways Act* 1912 (N.S.W.) and, as to wheat sold to

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purchasers in other States, of the *Commonwealth of Australia Constitution Act* and the *Inter-State Commission Act* 1912, and induced, procured and forced certain steamship companies to refuse to carry the wheat sold to purchasers in other States, in contravention of the *Commonwealth of Australia Constitution Act*.

Held, that the refusal of the shipping companies to carry the wheat having been caused by the refusal of the Collector of Customs to grant a permit for the carriage of the wheat, the Government of New South Wales was not liable for the refusal of its officer to grant a permit without which the Collector of Customs would not grant his permit.

Held, also, that evidence as to what would have happened with reference to the wheat crop if the Government had not put into operation the scheme was admissible, as tending to establish reasonable cause or excuse for doing the acts complained of.

A consent by the Attorney-General for the Commonwealth, given under regs. 10 and 10A of the *War Precautions (Supplementary) Regulations*, to the instituting of an action against the Government of New South Wales was held, in the particular circumstances, to cover all the causes of action sued on.

Observations as to "damages at large."

Decision of the Supreme Court of New South Wales: *De Lauret & Co.* v. *Whitfeld*, 20 S.R. (N.S.W.), 669, varied.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by De Lauret & Co. Ltd. against George Whitfeld, as nominal defendant for and on behalf of the Government of New South Wales. By the first count of the declaration the plaintiff alleged that it was carrying on the business of general traders, agents and brokers, and had in the course of such business purchased large quantities of wheat and had made contracts for the sale thereof, and had also made other contracts as agents and brokers for certain sellers for the sale to certain purchasers of other large quantities of wheat; and that the Government of New South Wales maliciously and without reasonable or lawful cause or excuse, and with intent to injure the plaintiff in its business, induced, procured and forced the sellers and purchasers of such wheat to break their contracts and to refuse to accept delivery of the wheat sold. By the second count the plaintiff alleged in respect of the same contracts that the Government maliciously and without reasonable or lawful cause or excuse, and with the intent alleged in the first count induced, procured and forced the Commissioners for Railways and Tramways in contravention of the *Government Railways Act* 1912

(N.S.W.) to refuse to carry large quantities of the wheat mentioned in the first count or to give delivery of the remaining portion of the wheat to the purchasers thereof. By the third count the plaintiff alleged that the plaintiff had in the course of its business entered into contracts for the sale of wheat which it had purchased to certain purchasers resident in Queensland and Tasmania, and as agents or brokers for certain sellers had made contracts for the sale of wheat to purchasers resident in Queensland and Tasmania, and that the Government maliciously and without reasonable or lawful excuse, and with the intent alleged in the first count induced, procured and forced the Commissioners for Railways and Tramways to refuse to carry the wheat in respect of which those contracts were made, in contravention of the *Government Railways Act* 1912, the *Commonwealth of Australia Constitution Act* and the *Inter-State Commission Act* 1912. By the fourth count the plaintiff alleged, in respect of the contracts mentioned in the third count, that the Government maliciously and with the intent alleged in the first count induced, procured and forced the Adelaide Steamship Co. Ltd. and the Union Steamship Co. of New Zealand Ltd. to refuse to carry the wheat in respect of which the contracts were made, in contravention of the *Commonwealth of Australia Constitution Act*. The plaintiff claimed £14,000 damages.

By the particulars the various contracts referred to in the four counts were specified, and were alleged to have been made on specified dates beginning with 29th November 1915 and extending through December 1915 and January and February 1916 to 1st March 1916.

The defendant by his plea pleaded not guilty, and that the acts complained of were done by the Government under the authority and with the sanction of the Government of the Commonwealth by virtue of the royal prerogative.

Towards the end of the year 1915 the Government of New South Wales brought into operation a scheme involving the formation of what was known as a " wheat pool " for marketing the wheat harvest for the season 1915-1916. Under this scheme the flour-millers of the State became agents for the Government to receive and store wheat, and one of the terms of the agreements between the Government and the flour-millers was that the latter were not to buy, sell,

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store or otherwise deal with wheat except wheat covered by their agreements with the Government. The scheme came into operation on 1st December 1915. The action arose out of alleged interferences by the Government, in the carrying out of that scheme, with the performance of the contracts made by the plaintiff.

The action was tried before *Pring* J. and a jury, who found a verdict for the plaintiff for £3,289 15s. 5d.

The defendant then moved that the verdict should be set aside and a new trial granted or a verdict entered for the defendant, and the Full Court ordered that the verdict be set aside and a new trial be granted: *De Lauret & Co.* v. *Whitfeld* (1).

From that decision the defendant now appealed to the High Court.

The other material facts are stated in the judgment of *Knox* C.J. hereunder.

Brissenden K.C. and *H. M. Stephen*, for the appellant.

Flannery K.C. (with him *Corringham*), for the respondent.

[During argument reference was made to *Brisbane Shipwrights' Provident Union* v. *Heggie* (2); *Pratt v. British Medical Association* (3); *Valentine* v. *Hyde* (4); *Davies* v. *Thomas* (5); *The Notting Hill* (6); *Merest* v. *Harvey* (7); *Willoughby Municipal Council* v. *Halstead* (8); *Exchange Telegraph Co.* v. *Gregory & Co.* (9); *The Mediana* (10); *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (11); *Joseph* v. *Colonial Treasurer* (*N.S.W.*) (12); *Larkin* v. *Long* (13); *Allen* v. *Flood* (14); *Lumley* v. *Gye* (15); *In re London, Tilbury and Southend Railway Co. and Trustees of Gower's Walk Schools* (16); *Black* v. *North British Railway Co.* (17).]

Cur. adv. vult.

(1) 20 S.R. (N.S.W.), 669.
(2) 3 C.L.R., 686, at p. 697.
(3) (1919) 1 K.B., 244.
(4) (1919) 2 Ch., 129.
(5) (1920) 2 Ch., 189.
(6) 9 P.D., 105.
(7) 5 Taunt., 442.
(8) 22 C.L.R., 352.
(9) (1896) 1 Q.B., 147.
(10) (1900) A.C., 113.
(11) (1905) A.C., 239.
(12) 25 C.L.R., 32.
(13) (1915) A.C., 814, at p. 831.
(14) (1898) A.C., 1, at p. 79.
(15) 2 El. & Bl., 216.
(16) 24 Q.B.D., 326.
(17) (1908) S.C., 444.

The following written judgments were delivered :—

KNOX C.J. The respondent Company having obtained a verdict for £3,289 15s. 5d. on the trial of this action, the appellant applied to the Supreme Court for a new trial on a number of grounds. On this application *Cullen* C.J. and *Ferguson* J. were of opinion that a new trial should be granted on the following grounds, viz. : (*a*) that the learned Judge at the trial was in error in directing the jury as a matter of law that the acts proved to have been done by the Government of New South Wales were done without excuse or lawful cause of any kind, and that if they were done intentionally and caused injury to the plaintiff it was the duty of the jury to find that they were done maliciously ; (*b*) that the jury were wrongly directed as to damages. *Wade* J. was of opinion that the new trial should be limited to assessment of damage, on the ground that there was ample material to support a verdict for the plaintiff on each of the first four counts of the declaration, and that if the jury had been correctly and fully directed the result would not have been otherwise.

In dealing with the application of the appellant for a new trial the Supreme Court decided : (*a*) that the learned Judge at the trial ought to have left to the jury the question whether the acts done by the Government were done maliciously and without reasonable and lawful excuse ; (*b*) that the authority given to the plaintiff under regs. 10 and 10A of the *War Precautions (Supplementary) Regulations* to institute proceedings extended to all the contracts referred to in the case ; (*c*) that it was open to the jury on the evidence given at the trial to find a verdict for the plaintiff on the fourth count ; (*d*) that the proper direction to the jury on the question of damages would be that the damages were at large—meaning apparently that no proof of specific damage was necessary and that the jury might give any amount they thought proper ; (*e*) that the learned Judge at the trial was right in rejecting the following question put by counsel for the defendant—"What, in your opinion, would have happened with reference to the wheat crop if the Government had not stepped in under the scheme known as the wheat pool ? "

From this decision the appellant brought an appeal to this Court on the following grounds, viz. : (1) that the Supreme Court should

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have held that upon the proper construction of the consent by the Attorney-General the plaintiff was not entitled to maintain this action in respect of all the contracts referred to in the case; (2) that the Supreme Court should have held that there was no evidence that the Government was liable in consequence of the non-performance of certain of the said contracts which by their terms were to be performed prior to the middle of February 1916; (3) that the Supreme Court should have held that the plaintiff can only recover damages for the interference with the performance of contracts so far as that interference prevented it from delivering wheat in accordance with the terms of such contracts; (4) that the said Court was in error in holding that upon the evidence damages were at large; (5) that the said Court was in error in holding that the Government was liable by reason of the interference of Harris with the shipment of wheat; (6) that the said Court was in error in holding that the Judge presiding at the trial was right in rejecting evidence tendered for the purpose of proving that the Government was justified in doing the acts complained of.

During the argument before us the Court expressed the opinion that the decision of the Supreme Court on the question raised as to the extent of the authority given under regs. 10 and 10A of the *War Precautions (Supplementary) Regulations* was correct. It is unnecessary to say more than that the question depends on the construction of the documents referred to (the consent of the Attorney-General and the statement upon which it was given) and that I agree with the construction put upon them by the Supreme Court. This disposes of the first ground of appeal.

The second and third grounds of appeal were not seriously pressed by Dr. *Brissenden*, in view of the fact that the points raised thereby did not amount to an answer to the whole cause of action alleged and that they would be open to the defendant on the new trial.

The fourth ground relates to the direction to be given to the jury on the question of damages. The Supreme Court adopted the expression "damages at large" from the judgment of *Esher* M.R. in *Exchange Telegraph Co.* v. *Gregory & Co.* (1). If this expression is intended to include exemplary damages, I can find nothing in

(1) (1896) 1 Q.B., at p. 153.

the evidence given at the trial which would justify a direction in these terms. Damages may be either compensatory or exemplary. Compensatory damages are awarded as compensation for and are measured by the material loss suffered by the plaintiffs. Exemplary damages are given only in cases of conscious wrongdoing in contumelious disregard of another's rights. On this footing I think the proper direction to the jury in the absence of any evidence justifying exemplary damages would have been that they should give such a sum as would compensate the plaintiff Company for the material loss suffered by it by reason of the wrongful acts of the defendant which constituted the cause of the action, taking into consideration that the defendant is only responsible for damage which was intended and for damage which is the natural and probable consequence of the wrongful acts. In other words, the plaintiff, if it established the cause of action, was entitled to recover for all the damage caused which was the direct consequence of the wrongful acts of the defendant and so probable a consequence that if the defendant had considered the matter he must have foreseen that the whole damage would result from those acts (see *In re London, Tilbury and Southend Railway Co.* (1)).

The fifth ground relates to the fourth count of the declaration, viz., inducing, procuring and forcing certain shipping companies to refuse to carry certain wheat. In my opinion the evidence establishes clearly that the refusal of the shipping companies to carry the wheat in question was caused not by any action taken by Harris, the officer in charge of the Government wheat operations, but by the refusal of the Collector of Customs to grant a permit for the carriage of the wheat. The State Government incurred no liability by reason of his refusal, for the Collector is an officer of the Commonwealth for whose acts the State Government is in no way responsible. The Supreme Court held rightly, in my opinion, that Harris's refusal to grant a permit, without which a permit could not be obtained from the Collector of Customs, afforded no cause of action against the defendant. The act of the Collector of Customs being the real cause of the refusal of the shipping companies to carry the wheat, Harris's interference gave rise to no cause of action,

(1) 24 Q.B.D., at p. 329.

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and, in my opinion, judgment should be entered for the defendant on the fourth count of the declaration.

The remaining ground of appeal is in respect of the rejection by the learned Judge at the trial of the question set out above. I am unable to agree with the decision of the Supreme Court that this evidence was rightly rejected. As there is to be a new trial, it is obviously undesirable to point out the exact bearing which this evidence, if admitted, might have on the question at issue. That question is whether the acts done by the Government were done maliciously and without reasonable or lawful cause or excuse. On that issue it is, as the Supreme Court pointed out, the duty of the jury to consider all the surrounding circumstances; and I say no more than that in my opinion it is certainly possible that the evidence sought to be given might in conjunction with other facts tend to establish reasonable cause or excuse for doing the acts complained of. It is true that neither the existence of the wheat pool nor the propriety of establishing it was a matter directly in issue in the action, but reasons which led to its institution might well be regarded as justifying its maintenance as an effective agency, and in this aspect of the matter it is impossible to say definitely that the evidence rejected was irrelevant.

The order should be that the appeal be allowed, and that the order of the Supreme Court be varied by directing that judgment be entered for the defendant on the fourth count of the declaration; the costs of the appeal to be costs in the cause.

ISAACS J. The present appellant moved the Supreme Court of New South Wales to set aside a verdict of £3,289 15s. 5d. which the present respondent had obtained, and to grant a new trial or enter a verdict for the appellant. The Court refused to enter a verdict, but granted a new trial. The appellant appealed to this Court, claiming that a verdict should have been entered for him or a new trial granted on certain grounds.

After some argument the appellant abandoned the claim to enter a verdict for him except as to the fourth count, but contended that in making the order for a new trial the Full Court had wrongly decided certain matters against him which should be corrected before the

trial, because they are in effect curial directions to the learned Judge who will preside at the trial.

Apart from the question as to the construction of the Attorney-General's consent, which clearly covers this case, and as to the fourth count, our observations are necessarily controlled by the circumstance that a new trial will take place.

1. The fourth count is based on the Government's having procured and forced two shipping companies to refuse to carry wheat inter-State for the plaintiff, the present respondent. Abundant evidence was given of the fact alleged, but the evidence established incontestably that the Government interference was of no legal consequence. The Commonwealth Government had established a course of administration by which shipments of wheat inter-State were not permitted to any vessel without a special permit from the State Wheat Office. The State Wheat Office was under no obligation to give such a permit, and had not given one, and the shipping companies acquiesced in this direction of the Commonwealth Government, and could not have been required by the respondent to expose themselves to the consequences of carrying wheat in defiance of the Commonwealth prohibition. It follows that, as incontestably no contract to carry wheat would or could in any case have, as a fact, been made inter-State, the acts complained of were resultless, and gave no cause of action to the respondent. The fourth count, therefore, is not sustained, and the appellant is entitled to have a verdict entered upon that count.

2. The next point is as to the decision of the Full Court that the damages are "at large." That expression is evidently based on the phrase quoted from Lord Esher's judgment in *Exchange Telegraph Co.* v. *Gregory & Co.* (1). The learned Master of the Rolls was there speaking of the circumstances as they appeared in that case, including what the learned Lord called "a contemptible and fraudulent act" towards the plaintiff, and his language was, of course, appropriate to such a case. In the present case, similar language may or may not be appropriate, according to the circumstances as they ultimately appear to the proper tribunal. But it cannot, consistently with established principles, be said of the

(1) (1896) 1 Q.B., at p. 153.

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tort alleged, that in its nature and apart from special circumstances the damages recoverable are damages at large. This action, it is true, is for a tort and not for breach of contract, and though to a great extent the principle of awarding damages is the same in tort as in contract, yet there are differences between them, and even between various classes of torts, and in different circumstances of the same class of tort. It is unnecessary, and at this stage it would be inadvisable, to enter into any detailed consideration of the rules governing the measure of damages in a case like the present. But it is proper to state some broad principles which apply without special reference to the circumstances in contest here.

Damages are, in their fundamental character, compensatory. Whether the matter complained of be a breach of contract or a tort, the primary theoretical notion is to place the plaintiff in as good a position, so far as money can do it, as if the matter complained of had not occurred (see per Lord *Blackburn* in *Livingstone* v. *Rawyards Coal Co.* (1)). This primary notion is controlled and limited by various considerations, but the central idea is compensation, or, as *Blackstone* (vol. II., p. 438) says, "compensation and satisfaction." There have been many judicial expositions as to the application of this principle, but I think it desirable to quote that of Lord *Shaw* in 1914, in the case of *Watson, Laidlaw & Co.* v. *Pott, Cassels & Williamson* (2), both because of its clearness and its authority and of the fact that it is not found in the ordinary reports. The learned Lord said :—"In the case of damages in general, there is one principle which does underlie the assessment. It is what may be called that of restoration. The idea is to restore the person who has sustained injury and loss to the condition in which he would have been had he not so sustained it. In the cases of financial loss, injury to trade, and the like, caused either by breach of contract or by tort, the loss is capable of correct appreciation in stated figures. In a second class of cases, restoration being in point of fact difficult, as in the case of loss of reputation, or impossible, as in the case of loss of life, faculty, or limb, the task of restoration under the name of compensation calls into play inference, conjecture, and the like. This is

(1) 5 App. Cas., 25, at p. 39.

(2) 31 R.P.C., 104, at pp. 117-118.

necessarily accompanied by those deficiences which attach to the conversion into money of certain elements which are very real, which go to make up the happiness and usefulness of life, but which were never so converted or measured. The restoration by way of compensation is therefore accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe." Now, without attempting to state the working rules which a Court must observe in relation to the various classes and instances of actions which come before it, and the recognized cautionary directions appropriate to particular occasions, Lord *Shaw* has very clearly set out the fundamental principle, and has also shown that the use of "the broad axe"—which the jury take in hand when the damages are at large—is only permissible in certain circumstances. Further, the learned Lord addressed himself only to "compensatory damages," and there is still a well recognized feature, which with one exception is, in the opinion of one learned writer, confined to damages for torts (see *Mayne on Damages*, 9th ed., at p. 41). I refer to what are called "exemplary damages." From a very early period exemplary damages have been considered by very eminent Judges to be punitive for reprehensible conduct and as a deterrent. That was the opinion of *Gibbs* C.J. and *Heath* J. in *Merest* v. *Harvey* (1) in 1814, and of *Story* J. in the *Amiable Nancy* (2) in 1818. In *Emblen* v. *Myers* (3) in 1860 *Pollock* C.B. used the expression "vindictive damages"; in 1861 *Byles* J., in *Bell* v. *Midland Railway Co.* (4), termed them "retributory damages"; in 1889 *Kay* J., in *Dreyfus* v. *Peruvian Guano Co.* (5), called them "vindictive"; in 1891 Lord *Hobhouse*, for the Privy Council in *McArthur & Co.* v. *Cornwall* (6), called them "penal"; in *The Mediana* (7) Lord *Halsbury* L.C. called them "punitive damages"; in 1908, in *Anderson* v. *Calvert* (8), Lord *Cozens Hardy*, and Lord *Wrenbury* (then in the Court of Appeal), used the word "punitive"; in 1913, in *Smith* v. *Streatfeild* (9), *Bankes* J. called them "vindictive" damages. See also *Willoughby Municipal Council* v. *Halstead* (10). This class of damages is, by the

(1) 5 Taunt., 442.
(2) 3 Wheat., 546, at p. 558.
(3) 6 H. & N., 54, at p. 58.
(4) 10 C.B. (N.S.), 287, at p. 308.
(5) 42 Ch. D., 66, at p. 77.
(6) (1892) A.C., 75, at p. 88.
(7) (1900) A.C., at p. 118.
(8) 24 T.L.R., 399.
(9) (1913) 3 K.B., 764, at p. 769.
(10) 22 C.L.R., 352.

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ISAACS J.

argument, claimed in the present case as well as compensatory damages also meted out by means of the "broad axe"; and the expression "damages at large" is so comprehensive that the trial Judge would find it difficult, as the judgment of the Full Court stands, to exclude either of them, once the bare tort was proved. The expression ought to be treated as eliminated from the judgment, and the matter left for direction according to the circumstances.

3. As to the rejection of evidence.—The case raises a question of considerable difficulty, and one which concerns a department of law as yet undefined. What is "just cause or excuse" for interference with contracts or business has yet to be closely examined. For several obvious reasons it would be out of place to attempt to deal with that subject, except to say that the decisions up to date make it necessary to permit considerable latitude in admitting evidence that upon any reasonable view could form, either alone or in combination with the circumstances proved or to be proved, a situation which would amount in law to an exoneration in respect of an act *primâ facie* tortious. *Romer* L.J., in *Glamorgan Coal Co.* v. *South Wales Miners' Federation* (1), enumerated a number of relevant circumstances; and Lord *Macnaghten* stated his general agreement with *Romer* L.J., in *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (2), as also did Lord *Lindley* (3). It may be that what is stated by Lord *Watson* in *Allen* v. *Flood* (4) and by Lord *Herschell* in the same case (5) ought, in principle, to regulate the result. What is the proper working out of the position, postulated in *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (6), particularly by Lord *Macnaghten* (7) and Lord *James* (8), or of Lord *Wrenbury* (then *Buckley* L.J.) in *Smithies* v. *National Association of Operative Plasterers* (9), or what is the true effect of such cases as *Rogers* v. *Rajendro Dutt* (10) and *Jose* v. *Metallic Roofing Co. of Canada* (11), cannot be determined without a fuller ascertainment of the facts, and consideration of the law upon the facts so ascertained. It is enough to say that the question put and rejected,

(1) (1903) 2 K.B., 545, at p. 574.
(2) (1905) A.C., at p. 247.
(3) (1905) A.C., at p. 252.
(4) (1898) A.C., at pp. 92-93.
(5) (1898) A.C., at pp. 118, 126, 128.
(6) (1905) A.C., 239.
(7) (1905) A.C., at p. 246.
(8) (1905) A.C., at p. 249.
(9) (1909) 1 K.B., 310, at p. 337.
(10) 13 Moo. P.C.C., 209.
(11) (1908) A.C., 514.

taken in conjunction with the rest of the evidence given, was sufficiently relevant to be admitted, because it had reference to the standing effect of the wheat pool, and the answer might have afforded information as to the result of breaking down the public arrangements constituted by the wheat pool, quite as much as the result of not instituting it. If, as *Stirling* L.J. says, rightly or wrongly, in the *Glamorgan Case* (1), a father might justify interference with a contractual relation by reason of his interest or a duty towards his child; if, as Lord *Macnaghten* says (2), instances of justification are not difficult to give—and Lord *Wrenbury*, as quoted, gave some which he thought sound,—and if, as *Stirling* L.J. said at the page above quoted, and, as I venture to believe, with perfect accuracy, "it must be left (in the language of Lord *Bowen*) to the tribunal to analyse the circumstances of each particular case and discover whether a justification exists or not": it appears to me that the question put and rejected was not too remote to have ultimately a reasonably possible effect in law on the question of "just cause or excuse," and that its rejection may, for all that so far appears, have deprived the appellant of a legal right of exoneration for an act *primâ facie* wrongful.

RICH J. I agree in the conclusions arrived at by the other members of the Court, and may briefly state my reasons. The Attorney-General's consent is wide enough to cover the claims.

The fourth count is disproved by the plaintiff's evidence, and the defendant was entitled to a direction. In the circumstances not only not denied but proved by the plaintiff itself, the intervention of the Government to prevent the shipping companies making contracts was innocuous. The companies were entitled to regard, as they did regard, the Federal direction as binding unless a permit was given, and as the Government of New South Wales owed no duty to the plaintiff to give a permit the plaintiff has failed to establish any actionable interference with its right of employing the shipping companies as carriers.

The use of the expression "damages at large" might lead to misapprehension. It may be proper to tell the jury that, or it may

(1) (1903) 2 K.B., at p. 577. (2) (1905) A.C., at p. 246.

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not. It is enough to say it is not necessarily right. The evidence rejected ought to have been received and considered at the end with any other relevant facts proved on the question of "just cause or excuse." No definition of "just cause or excuse" has yet been given which would exclude the question under the circumstances. It ought to have been allowed so that the defence might be fully investigated.

Appeal allowed. Order appealed from varied by directing that judgment be entered for the defendant on the fourth count. Costs of appeal to be costs in the cause.

Solicitor for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitor for the respondent, *A. G. de L. Arnold.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE UNION STEAMSHIP COMPANY OF NEW ZEALAND LIMITED . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

H. C. OF A. 1920. SYDNEY, *Dec.* 6, 7.

War-time Profits Tax—Assessment—Foreign company—Liability to tax—Failure to make returns—Method of assessment—Objections to assessment—Excessive assessment—War-time Profits Tax Assessment Act 1917 (*No.* 33 *of* 1917), *secs.* 7, 10, 16, 22, 28, 55 (1)—*Income Tax Assessment Act* 1915-1916 (*No.* 34 *of* 1915—*No.* 39 *of* 1916), *sec.* 22.

Isaacs, Gavan Duffy and Rich JJ.

The business of a shipping company incorporated outside the Commonwealth consisted of trading between ports outside and ports within the Commonwealth, and of carrying passengers and cargo from ports outside the Commonwealth to ports within the Commonwealth and *vice versâ*. For this purpose the company owned certain land and was the lessee of certain other land within